Cross-border insolvency - Supreme Court declines UNCITRAL Model Law recognition and winds up a foreign company registered in Australia

Elly Phelan (led by Emma Beechey) recently appeared in the Supreme Court for a creditor opposing an application for recognition of a UK moratorium proceeding under the UNCITRAL Model Law on Cross-Border Insolvency (**Model Law**), as part of the applicant's attempt to stay an Australian winding up of a foreign registered company: *In the matter of Hydrodec Group Plc* [2021] NSWSC 755 (Williams J).

This is the first court decision worldwide concerning recognition under the Model Law of the UK's new, easily accessible corporate moratorium proceeding. It is also the first time that the Supreme Court of New South Wales has dealt with a case under the Model Law. The case establishes that the UK moratorium procedure qualifies for recognition as an insolvency proceeding under the Model Law, it provides useful guidance on the test for COMI (centre of main interest) under the Model Law in Australia, and also deals with the winding up of foreign companies in Australia.

Hydrodec Group Plc (**Hydrodec**) was the UK holding company of oil refining companies in the US, Australia and Japan. At the time of the decision, only the US companies were operational. Hydrodec was, until recently, listed on the London Stock Exchange.

Southern Oil Refining Pty Ltd (**SOR**) had obtained a $1.6 million judgment debt against Hydrodec in Australia. SOR issued a demand under s 585(a) of the *Corporations Act 2001* (Cth) and commenced winding up proceedings when the demand remained unsatisfied.

Hydrodec sought orders under Articles 15 and 17 of the Model Law that the UK moratorium proceeding be recognised as a 'foreign main proceeding' and that Hydrodec itself, or alternatively the joint monitors under the moratorium, be recognised as the 'foreign representative'. The UK moratorium is found in the new Part A1 of the *Insolvency Act 1986* (UK). A moratorium can be commenced by a resolution of the company's directors. Provisions preventing companies subject to winding up applications from accessing the moratorium without an order of the Court had been waived under COVID-19 legislation under the end of September 2021. The purpose of the moratorium was said to be to allow Hydrodec time to refinance its operations. A UK moratorium proceeding is initially for 20 to 40 days, but with the approval of a two-thirds majority in value of creditors, it can be extended for up to one year.

Justice Williams found that the UK moratorium procedure was a 'foreign proceeding' within the meaning of that term under the Model Law, and therefore such a proceeding was eligible for recognition under the Model Law. Her Honour also found that the joint monitors appointed to oversee the operation of the moratorium were the 'foreign representatives' that the Court would recognise under the Model Law, despite the fact that the company itself remained in charge of its own affairs as a debtor-in-possession under the UK moratorium.

Hydrodec initially argued that, if recognition were granted, the winding up proceedings would be automatically stayed under Article 20 of the Model Law. However, Article 20(4) carves out winding up proceedings from the automatic stay. Instead, Hydrodec sought a discretionary stay of the winding up application under Article 21 of the Model Law or alternatively, s 581 of the *Corporations Act 2001* (Cth) (***Corporations Act***), on the basis that Hydrodec had entered into a moratorium in the United Kingdom.

Hydrodec argued that its centre of main interests (**COMI**) (a prerequisite to recognition as a foreign main proceeding) was in the United Kingdom, as that was where it was incorporated and where its directors met and were resident. Hydrodec did not seek recognition as a foreign non-main proceeding, as it accepted that it did not have an 'establishment' in the UK, a requirement for non-main proceeding recognition.

SOR contended that Hydrodec's COMI was not in the UK, but was instead in the USA, where Hydrodec had its only operating subsidiary. Hydrodec's Annual Report and website promoted it as a company focused on the US market, with only one plant, in Canton, Ohio, USA. Hydrodec's financiers were also located in the USA, and Hydrodec's office in the United Kingdom was no more than a post box.

Her Honour found that Hydrodec's COMI was in the USA, adopting the same approach to determining the COMI of a holding company as was taken in *Young, Jr, in the matter of Buccaneer Energy Ltd v Buccaneer Energy Ltd* [2014] FCA 711, [14] (Jagot J) and in *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc* [2016] VSC 308; (2016) 52 VR 1 (Randall AsJ). In each case, the location of the activities of the holding company's subsidiaries was found to be relevant to determining the COMI of the parent company. Her Honour also followed the *Indian Farmers* decision in holding that the Model Law rebuttable presumption that a company's COMI is in the place where the company has its registered office does not apply where the company has two registered offices: one in its country of incorporation, and one in Australia (this being a requirement for registration as a foreign company carrying on business in Australia).

The Court accepted SOR's submission that Hydrodec's COMI was not in the UK. Accordingly, the UK moratorium proceeding could not be recognised as a foreign main proceeding under the Model Law.

As to the application for a stay under s 581 of the *Corporations Act*, which requires that the Australian court assist certain other courts in insolvency matters, the Court held that it would not be proper in all the circumstances to provide aid to the English Court by staying the Australian winding up application, following *Legend International Holdings Inc (in liq) v Indian Farmers Fertiliser Cooperative Limited* [2016] VSCA 151; (2016) 52 VR 40. The Court determined that Hydrodec was unable to pay its debts and did not have a plan for its rescue other than the refinance which it had been trying to achieve since a least late 2019. The Court also accepted SOR's submission that an Australian liquidator would be able to investigate potential voidable transactions and insolvent trading claims in relation to the company, in circumstances where transactions had been entered into by Hydrodec on the morning of the moratorium which had the effect of improving the security position of Hydrodec's largest creditor, who was a director and a former major shareholder of Hydrodec.

Accordingly, the Court ordered that Hydrodec be wound up in Australia.

A link to the judgment can be found here: In the matter of Hydrodec Group Plc - NSW Caselaw

Counsel for the applicant (John Baird) and lead counsel for the respondent (Emma Beechey) are both Fellows of INSOL International. A detailed case note can be found in the latest issue of INSOL World at https://publications.insol.org/view/964914719/.